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CITATIONS

Cases:

Beuttas v. *United States*, 101 C. Cls. 748, reversed, 324 U. S. 768 — 9, 13, 17

Blair v. *United States*, 99 C. Cls. 71, reversed, 321 U. S. 730 — 9, 14, 17, 18

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Minnesota v. *United States*, 305 U. S. 382 — 12

Plumley v. *United States* 226 U. S. 545 — 13, 16, 17

677717—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

NOS. 696 AND 697

THE UNITED STATES, PETITIONER

v.

JOSEPH A. HOLPUCH COMPANY, A CORPORATION

THE UNITED STATES, PETITIONER

v.

JOSEPH A. HOLPUCH COMPANY, A CORPORATION

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the Court of Claims of the United States entered in the above-entitled cases on May 7, 1945.

OPINIONS BELOW

The opinions of the Court of Claims (No. 696, R. 43; No. 697, R. 44) are not yet officially reported.[1]

[1] Both cases were heard, argued and submitted together in the court below (No. 697, R. 44). Unless otherwise specified, numerical references to the findings of fact of the court below designate the findings in both cases.

JURISDICTION

The judgments of the Court of Claims were entered on May 7, 1945 (No. 696, R. 49; No. 697, R. 46). Motions for new trials were overruled on October 1, 1945 (No. 696, R. 50; No. 697, R. 47). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

1. Whether, under standard form government contracts, the Court of Claims can substitute its judgment as to the interpretation of plans and specifications for that of the constructing quartermaster, where the specifications designated the latter as the "interpreter" of plans and specifications, and where the contractor did not appeal from the constructing quartermaster's ruling, as required by Article 15 of the contract.

2. Whether a contractor may recover wages paid to certain of its employees over and above the minimum wage rates specified in the contracts, where (1) the increased minimum wage rates were not established by the Federal Emergency Administration of Public Works, and (2) the contractor failed to take an administrative appeal from an oral direction of the constructing quartermaster directing that the increased wages be paid.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contracts and specifications involved are set forth in Appendix A, *infra*, pp. 20–24.

STATEMENT

The following facts, as found by the court below unless otherwise specified, are common to both cases and may be summarized as follows:

Respondent, who is engaged in the building construction business in Chicago, on November 2 and 29, 1933, entered into two contracts with the United States through the War Department to construct officers' quarters at Fort Sam Houston, Texas, as part of a Federal Emergency Administration of Public Works project (Fdgs. 1 and 2). The work was to be completed in September and October, 1934, but because of delay, not here in issue, the work was not accepted as complete until November and December 1934 (Fdgs. 2 and 7). On January 12, 1938, the respondent brought two suits in the Court of Claims to recover, *inter alia*, (1) payments for excavations of footings to depths shown in the drawings, and (2) increased wages paid to its bricklayers (No. 696, R. 1; No. 697, R. 4–5, 7–8). Judgments were entered for the respondent on both claims.[2]

1. *Footing Depths* (*Fdg. 6*).—Article 3 of the specifications directed that the contractor excavate for footings "down to the depth and levels shown on the drawings," but that if "suitable bear-

[2] Respondent also sought to recover compensation for extra work performed, increased costs for lumber purchased, and liquidated damages assessed against the respondent. These claims were all rejected by the court below (No. 696, R. 43, 45–46, 48–49; No. 697, R. 44, 45).

ings [should] not be encountered at the levels shown on drawings, they shall be carried on to such levels as may be necessary and approved" by the constructing quartermaster. It also provided:

> Authorized increase or decrease in amount of excavation shall be paid for by or credited to the U. S. as per amount mentioned for excavating under "Unit Prices" of bid.

Article 4 of the specifications provided:

> For estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level. The unit prices quoted in the bid will govern for any additions or deductions.

The court found "that the depth of footings was shown on the drawings as 33 feet from the finished floor of the building, and that it was on this basis that [respondent] estimated its bid" (No. 696, R. 37).

Respondent excavated to the depths approved by the Government's inspectors, and in making payment under the contracts, the differences between actual excavation depths and 37 feet 6 inches, at the unit prices named in the contracts, were withheld from the contract price. This deduction was calculated by the construction quartermaster and applied by the finance officer. The court held that the determination of the correct footing depths to be applied "was not a controversy over what work the contract and its specifications required," but that it is "a question of how the

contract price is to be computed," and that in view of the fact that the contracts stated on their "face that [they are] 'To be paid by the Finance Officer, United States Army, Fort Sam Houston, Texas'," the "responsibility for making correct payment was on the finance officer" (No. 696, R. 47). For this reason, the court stated that the "decision of the contracting officer as to the amount thereof would have been advisory, at the most, and that there was no appealable decision confronting" the contractor (*ibid.*). The court held that the "inconsistency" between the drawings and specifications was "impossible to reconcile," that the "33-foot base is the more logical of the two" (*ibid.*), and accordingly entered judgments against the United States in the amounts of $5,793.19 (No. 696, R. 48) and $4,922.87 (No. 697, R. 48).

2. *Bricklayers' Wages* (*Fdg. 4*).—Article 18 (a) of the two contracts here involved provided that the contractor should not pay skilled labor less than $1.00 per hour.[3] Article 18 also provided:

> (c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates

[3] In No. 697, Article 18 (a) originally provided a minimum of $1.10 per hour for skilled labor, but this was subsequently modified by the parties to $1.00 per hour (R. 34–35).

specified above, such agreed wage rates shall apply * * *.

* * * * *

(e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In the event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

(f) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

On March 3, 1934, the Board of Labor Review in connection with another project for Army construction at San Antonio, Texas, to which the respondent was not a party, ruled that bricklayers employed thereon should be paid at the rate of $1.25 per hour retroactive to February 2, 1934. This decision was transmitted to the respondent by the constructing quartermaster on March 20, 1934, who, on March 23, 1934, advised the respondent that all bricklayers employed on the

project "will be paid at the rate of $1.25 per hour." On March 29, 1934, the respondent stated under protest that it would be governed accordingly, and that it expected reimbursement of the difference of 25 cents per hour.

On May 12, 1934, the constructing quartermaster advised respondent that it was the decision of the contracting officer that bricklayers employed on War Department construction projects at San Antonio, Texas, and vicinity should be paid $1.25 per hour, retroactive to February 2, 1934, and that the contractor would be within its "rights to file appeal with the Board of Labor Review from the decision of the contracting officer." Respondent took no such appeal and paid its bricklayers $1.25 per hour. Stating that the "ordered increase of 25 cents an hour in wages increased the contract price under the terms of Article 18 (e)" and that "it was plainly of no special interest to [the contractor] to [appeal to the Board of Labor Review], for the contract provided an automatic increase in contract price to cover such an increase in wages" (No. 696, R. 45), the Court of Claims entered

[4] Chief Justice Whaley delivered the "opinion of the court" in both cases, in which Judges Madden and Littleton concurred; Judges Jones and Whitaker took no part in the decision of either case. (No. 696, R. 43, 49; No. 697, R. 44–45.) Although the court below wrote two opinions in these cases, the reasons underlying the decisions are found in the opinion in No. 696. These reasons are adopted in the court's opinion in No. 697.

judgments against the United States for $821.63 and $3,299.00 on these claims (No. 696, R. 45; No. 697, R. 45).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

(1) In holding that the dispute as to footing depths was not one which the parties had agreed to submit to the constructing quartermaster and the contracting officer for final determination;

(2) In holding that it had authority to reconcile the dispute as to footing depths and to substitute its judgment for that of the constructing quartermaster;

(3) In holding that the finance officer's duty to make payments under the contracts deprived the constructing quartermaster and the contracting officer of the authority to make a binding ruling as to footing depths.

(4) In holding that 33 feet was the proper footing depth to be applied.

(5) In holding that the minimum wage rates were increased under Article 18 (e) of the contracts.

(6) In failing to hold that the increased minimum wage rates were paid by the respondent pursuant to directions under Article 18 (c) of the contracts, for which the United States assumed no liability.

(7) In failing to hold that there was a dispute as to whether increases in minimum wage rates

were ordered under Article 18 (c) of the contracts which the parties had agreed to submit to the contracting officer under Article 15.

(8) In entering judgments for the respondent.

REASONS FOR GRANTING THE WRITS

1. Article 15 of the standard form government contract[5] provides that "all disputes" except labor disputes, "concerning questions arising under this contract shall be decided by the contracting officer * * * subject to written appeal by the contractor * * * to the head of the department * * * whose decision shall be final and conclusive." This Court has repeatedly recognized that Article 15 constitutes "the only avenue for relief" available for the settlement of disputes concerning questions arising thereunder, and that unless resort to that provision is made by the contractor, no claim for damages may be asserted in the Court of Claims. *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61; *United States* v. *Blair*, 321 U. S. 730, 735; *United States* v. *McShain*, 308 U. S. 512, 520–521. The court below has failed here to follow those decisions, and has substituted its own judgment for that which the contracts en-

[5] The form of government contract here involved is "U. S. Government Form P. W. A. 51" (No. 696, R. 12; No. 697, R. 12), and is identical with those considered by this Court in *United States* v. *McShain*, 308 U. S. 512; *United States* v. *Blair*, 321 U. S. 730; and *United States* v. *Bentas*, 324 U. S. 768.

trusted exclusively to the administrative officers. It held that the interpretation of the drawings and specifications, insofar as the determination of footing depths for compensation purposes was concerned, was to be made by the finance officer and not by the officers named in the contracts and specifications to interpret the specifications and settle disputes. From this it concluded that it could substitute its decision for that of the finance officer, inasmuch as the contracts did not make his decision final. We submit that in so holding the court below has decided an important question of government contract law in a manner which conflicts with the obvious intent of the contracts and the controlling decisions of this Court.

The court below found (Fdg. 6) that while Article 4 of the specifications stated that for "estimating purposes the depth of foundations will be estimated at 37 feet 6 inches," and that the constructing quartermaster calculated the deductions to be made from the contract price on the 37 feet 6-inch base, such depths were "shown on the drawings as 33 feet * * * and it was on this depth that [the contractor] estimated its bid." Despite the fact that Article 2 of the contracts and Article G. C. 21 of the specifications provided that in "case of difference between drawings and specifications, the specifications shall govern," the court below held that there was "an inconsistency" between the drawings and speci-

fications which was "impossible to reconcile," and resolved the issue by applying the 33-foot depth as the base for computing the amounts due the respondent under the two contracts because "Logic and reason tip the balance in favor of the 33-foot pay basis" (No. 696, R. 48).[6] The court below reached this conclusion on the ground that this "was not a controversy over what work the contract and its specifications required" but a "question of how the contract price is to be computed," and that the "decision of the contracting officer as to the amount thereof would have been ad-

[6] The "logic and reason" which persuaded the court below to adopt the 33-foot basis was stated to be the fact that "the 33 feet were shown on the drawings and that turned out to be approximately the average," that such a base "permits additions as well as deductions," and that "by using the 37-foot-6-inch pay basis there resulted no additions whatever to the contract price, only deductions, a one-sided proposition, somewhat to [the respondent's] discomfiture" (No. 696, R. 48). The findings of the court, however, render the court's reasoning somewhat questionable. The court found (Fdg. 6) that the soil "beneath the projected houses was, when wet, shifting and unstable," and it seems obvious that additions and deductions to the contract price for footing depths were stipulated in the contract because actual footing depths were unforseeable. The court also found that in No. 627 the actual footing depths actually ranged up to 42.42 feet. In light of the fact that the soil was unstable and that footing depths did actually range up to some 42 feet, the respondent's "discomfiture" which resulted because the actual footing depths averaged 32.49 and 34.43 feet (Fdg. 6), thus permitting only deductions from the contract price, can hardly be said to be a "one-sided proposition" warranting the adoption of the 33-foot basis as the more "logical" of the two bases.

visory, at the most" (No. 696, R. 47), because the "face of" the contract provided that it is "To be paid by the Finance Officer, U. S. Army, Fort Sam Houston, Texas," and that accordingly "the responsibility for making correct payment was on the Finance Officer" (*ibid.*).

It is to be observed that the finance officer is not mentioned in the body of the contracts, and the notation on their face is "merely an indication to the constructing quartermaster to which disbursing officer the constructing quartermaster should certify vouchers" for payment. See Statement of Administrative Practice, Appendix B, *infra*, pp. 25–28. The administrative practice has consistently been that the "designation of the Finance Officer is not a term of the contract", that he is not authorized to alter or modify the decisions of a constructing quartermaster, the contracting officer, or the head of the department, and that he may not undertake to determine questions arising under the contracts which are entrusted to the former. *Ibid.*[1]

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[1] The Statement of Administrative Practice which has been reproduced was submitted to the court below with the motion for a new trial. Cf. *Minnesota* v. *United States*, 305 U. S. 382, 390. As it discloses, there is usually a finance officer who acts as disbursing officer in every War Department construction contract. If a finance officer were responsible for the correctness of the decision of the contracting officer upon all questions affecting the amount of payment, it would be difficult to conceive of what questions would be left open to the contracting officer for decision. If, for example, a contracting officer decided that a contractor had excavated

The principal error of the court below, however, is that it failed to follow or apply the controlling provisions of the contract. Aside from the fact that it ignored Article 2 of the contract and G. C. 21 of the specification which provide that in the event of conflict between the specifications and drawings, the specifications shall control, the "inconsistency," if any, between the plans and specifications was a dispute precisely within the terms of Article G. C. 10 of the specifications which designated the constructing quartermaster as the "interpreter" of the "true intent and meaning of the drawings and specifications." This Court has repeatedly held (*Plumley* v. *United States*, 226 U. S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *United States* v. *McShain*, 308 U. S. 512, 520–521, reversing *per curiam*, 88 C. Cls. 284) that ambiguities in plans and specifications pose questions under government contracts susceptible of final and conclusive determination by the government officers designated in the contracts.[8] The court below also

2,000 cubic yards, the contracting officer's decision as to such a question of fact would not be final under the decision of the court below because of the disbursing officer's responsibility for payment.

[8] Cf. *Bouttas* v. *United States*, 101 C. Cls. 748, reversed in 324 U. S. 768, where the court below stated (101 C. Cls. 768): "It is true that it is not uncommon in construction contracts for the parties to agree that the decision of the architect or engineer shall be final on such questions as the proper interpretation of the plans and specifications * * * and similar matters of fact."

ignored the broader provisions of Article 15 which directs that all "disputes [except labor issues] concerning questions arising under the contract shall be decided by the contracting officer" subject to written appeal to the head of the department (*infra*, p. 20). In light of these provisions, the resolution of the "inconsistency" by the court below was unwarranted, and respondent's failure to appeal to the contracting officer under Article 15, from the ruling of the constructing quartermaster should have barred its recovery. *United States* v. *Callahan Walker Co., supra*, at 61; *United States* v. *Blair, supra*, at 735.

2. The court below also erred in entering judgment for the additional wages paid to bricklayers. It found (Fdg. 4) that during the performance of respondent's contracts the Board of Labor Review, in connection with another project for Army construction at San Antonio, Texas, to which the respondent was not a party, ruled that bricklayers employed thereon should be paid at the rate of $1.25 per hour; that on March 23, 1934, the effect of this decision was conveyed to the respondent by the constructing quartermaster who advised respondent that all bricklayers employed on the projects here involved "will be paid at the rate of $1.25 per hour;" that the contractor paid this rate "under protest," expecting reimbursement of the difference of 25 cents per hour; that the constructing quartermaster advised the

respondent on May 12, 1934, that it was the decision of the contracting officer that bricklayers employed on War Department construction projects in San Antonio and vicinity should be paid $1.25 per hour; and that no steps were taken by the respondent under the contracts to avert its liability for the increased wages paid to the bricklayers. The court below allowed recovery on this item, ruling that the increase in bricklayers' wages was "ordered" under Article 18 (c) of the contracts which, the court stated, "provided an automatic increase in contract price to cover such an increase in wages" (No. 696, R. 45).

Article 18 (c) provided that the minimum rates specified in 18 (a) were "subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review," in which event the contract price was to be adjusted accordingly. Article 18 (c) provided that "in the event that the prevailing hourly rates prescribed under collective bargaining agreements or understandings between organized labor and employees * * * shall be above the minimum rates specified * * *, such agreed rates shall apply." There is no finding that the Federal Administration of Public Works ordered respondent to pay its bricklayers more than the minimum wage rates specified in Article 18 (a) of the contracts as supplemented by Article 18 (c). Accordingly, the "advice" of

the constructing quartermaster that the bricklayers on respondent's projects "will be paid at the rate of $1.25 per hour" and the "decision" of the contracting officer to the same effect (Fdg. 6), were not orders increasing wage rates under Article 18 (e) of the contracts, but evidently directions under Article 18 (c) to pay the minimum wage rates provided by existing agreements. At the very least, any question whether the direction was one under Article 18 (c) or under Article 18 (e) was an appropriate matter for resolution under Article 15 of the contracts, which respondent did not invoke.

Even under the view of the court below, if the action of the constructing quartermaster and the contracting officer be regarded as an order to the respondent to increase the minimum wage rates under Article 18 (e) of the contracts, the respondent's resulting cost increases would be a consequence of oral advice of subordinate Government officials not "in the manner required by the contract." *Plumley v. United States*, 226 U. S. 545, 547. If the respondent had deemed such action improper, as apparently it did since the increased wages were paid "under protest" (Fdg. 4), its remedy was under Article 15 of the contracts,[9] a

[9] Nothing in the contracts involved in this case specifically excepts the instant dispute from Article 15. "Labor issues" arising under the contracts, which Article 15 requires to be submitted to the Board of Labor Review if they "cannot be satisfactorily adjusted by the contracting officer," clearly embrace only issues between employers and employees.

provision which this Court has recognized affords "the Government * * * an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions," the respondent is "not free to disregard them." *United States* v. *Blair*, 321 U. S. 730, 735; *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61. Thus, respondent's election to proceed without obtaining orders in the manner provided by the contracts, and its failure to invoke Article 15, should have barred its recovery in the court below. *United States* v. *Blair*, *United States* v. *Callahan Walker*, *United States* v. *McShain*, *Plumley* v. *United States*, all *supra*.

3. The Government is aware that, ordinarily, erroneous decisions do not warrant writs of certiorari. The instant decisions, however, are the latest of a series in which the Court of Claims has refused to recognize the authority of designated officers of the United States to settle administratively, without litigation, disputes arising under its construction contracts. See *McShain* v. *United States*, 88 C. Cls. 284, reversed *per curiam*, 308 U. S. 512, 520–521; *Callahan Walker Co.* v. *United States*, 95 C. Cls. 314, reversed, 317 U. S. 56; *Blair* v. *United States*, 99 C. Cls. 71, reversed, 321 U. S. 730; *Beattas* v. *United States*, 101 C. Cls. 748, reversed, 324 U. S. 768. In the instant cases, where Article 15 of the contracts plainly intended that the contracting officer decide all "questions aris-

ing" thereunder, the court below refused to accord that provision any meaning with respect to questions as to (1) the interpretation of plans and specifications, and (2) whether wage increases were ordered under the contracts. The decision thus operates to deprive the Government "of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims" (*United States* v. *Blair*, *supra*, p. 735) in an important class of cases.

Moreover, that portion of the decisions of the court below which holds that the responsibility for payment resting in a finance or disbursing officer deprives a contracting officer of power to adjudicate disputes under a standard form government contract throws serious doubt and confusion upon the authority of contracting officers under these contracts. In light of the fact that nearly every War Department construction contract indicates on its cover that payments are to be made by the finance officer of a particular district (Appendix B, *infra*, p. 25), a decision of this Court on this issue is of great importance to the Government. If such a notation can nullify Article 15 of a standard form construction contract, the effective submission of disputes to administrative decision will frequently be frustrated. We submit that the power of the Government to make effective contracts of this character should not be so circumscribed and that the decisions below should be reviewed.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writs of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

DECEMBER 1945.

APPENDIX A

CONTRACT PROVISIONS

Articles 2, 15, and 18 of the contract provided:

ART. 2. *Specifications and drawings.*—* * * In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. * * *

* * * * *

ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor, within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

* * * * *

ART. 18. *Wages*—(a) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:

Skilled labor	$1.00[1]
Unskilled labor	.40

* * * * *

(c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided*, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

* * * * *

(e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

(f) The Board of Labor Review shall hear all labor issues arising under the op-

[1] In No. 697, the minimum wage for skilled labor was originally $1.10, but was thereafter modified by the parties to $1.00 (R. 35).

eration of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

SPECIFICATIONS

Articles 3 and 4, and paragraph 45 of the specifications provided:

3. *Excavation.*—Do all excavating of every description and of whatever substances encountered to the dimensions and levels shown. All excavated material, including top soil, shall be deposited around the buildings, where and as directed by the C. Q. M. Top soil shall be stacked separately.

Excavation for footings shall be carried down to the depth and levels shown on drawings. However, should suitable bearings not be encountered at the levels shown on drawings, they shall be carried to such levels as may be necessary and approved by the C. Q. M.

Authorized increase or decrease in amount of excavation shall be paid for by or credited to the U. S. as per amount mentioned for excavating under "Unit Prices" of bid.

Care shall be taken not to excavate beyond the depths shown on drawings, as no backfilling under footings will be permitted, and any excess below the levels shown shall be filled with concrete at the expense of the Contractor. The excavations for footings shall be properly leveled off and cleared of all loose earth to the end that footings shall rest on compact undisturbed bottoms.

All excavations shall be maintained in good order during the progress of the work,

and, if necessary, sheet piling shall be used and maintained in position until removal is authorized by the C. Q. M.

4. Excavation for pier foundations will be made with a suitable boring machine acceptable to the C. Q. M. Such excavation will extend to block clay or other soil which in the opinion of the C. Q. M. has sufficient bearing value for the purpose intended. If wet or unstable materials are encountered in the process of boring holes, the excavation must be cased with metal casings of ample strength to prevent crushing. Casings may be collapsible or of one length.

Ground water encountered must be kept from the excavation at all times. In no case will water be permitted to reach footing bottoms.

At the contractor's option, reaming of conical shaped bottoms may be performed either by hand or mechanical methods. For estimating purposes the depth of foundations will be estimated at 37 feet 6 inches below first floor level. The unit prices quoted in bid will govern for any additions or deductions.

* * * * *

45. *Footings, etc.*—The Contractor shall see that the bottom of all excavations are of undisturbed soil, properly leveled before pouring footings.

Extension of foundations beyond dimensions given on the drawings where required by nature of soil, etc., will be paid for as an extra, but the price allowed per cubic yard shall be as stated in "Unit Prices" of the bid. If solid foundation is found at a lesser depth than the dimension given on the drawings, then a credit will be given the U. S., based on the "Unit Prices."

Article G. C. 10 of the specifications provided:

> *Interpretation of Contracts.*—Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the C. Q. M. [meaning the defendant's constructing quartermaster] shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

Article G. C. 21 of the specifications provided:

> *Discrepancies.*—* * *. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the C. Q. M., without whose decision said discrepancy shall not be adjusted by the Contractor, save only at his own risk * * *. In case of difference between drawings and specifications, the specifications shall govern.

APPENDIX B

ADMINISTRATIVE PRACTICE

(See supra, p. 12, n. 7)

STATE OF VIRGINIA,
County of Arlington, ss:

Adel C. Harden being duly sworn deposes and says:

"I am a Colonel in the Finance Department, United States Army, and am presently assigned as Chief, Receipts and Disbursements Division, Office of the Fiscal Director, Army Service Forces. I have had over twenty-five years experience in fiscal matters and I have years of experience handling disbursing accounts. I have effected payment on many construction contracts.

The practice is to have all contracts made with the Army paid by a disbursing officer after certification by a certifying officer, who may or may not be the same person as the disbursing officer. Usually upon cover pages of all construction contracts, the disbursing officer is designated as the Finance Officer of a particular district. Such a notation appeared on the cover of the contracts involved in the cases of *Joseph A. Holpuch* v. *The United States*, Court of Claims Nos. 43809 and 43812, as follows:

To be paid by the Finance Officer, U. S. Army, Fort Sam Houston, Texas.

This is merely an indication to the constructing quartermaster to which disbursing officer the constructing quartermaster should certify vouchers.

The designation of the Finance Officer is not a term of the contract. It is part of an outline showing the parties, the amount, the site of the work, the services to be performed, and the authorized accounts to which payments will be charged. The contract preamble and all of the contract terms follow the designation of the disbursing officer, which office might on Army orders be changed at any time. In making such a change the War Department would definitely not seek the consent of the contractor.

The contracts themselves provided:

> ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor, within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.
>
> ART. 16. *Payments to contractors.*—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the

contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration. * * *

Article G. C. 10 of the specifications provided:

> *Interpretation of contract.*—Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the C. Q. M. (meaning the defendant's constructing quartermaster) shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

On a construction contract containing the above terms the disbursing officer would not in practice alter or modify and would not be authorized to alter or modify the decision of a certifying construction quartermaster as to the basis on which payments can be made under the contract when such basis, as here, is dependent upon an interpretation of the specifications or has been covered by a decision on a dispute by the contracting officer. If the disbursing officer desired to question the propriety of making payment based on such an interpretation or decision he could submit the matter to the Comptroller General as a request for advance decision (31 U. S. C. 74) or he could transmit the matter to the General Accounting Office for settlement (31 U. S. C. 71).

I understand that payment for excavation of foundations was made in a monthly progress payment certified to by the constructing quarter-

master; that in certifying the voucher for such payment the constructing quartermaster determined that the correct base for figuring additions or deductions to the contract at unit prices was 37 feet 6 inches rather than 33 feet. Such a decision in our practice would not be made by a disbursing officer, because we would consider it to have been made under paragraph GC–10 of the specifications. Therefore, the Finance Officer would have no duty or authority to overrule it. Only if it were apparent that fraud was being practiced might the disbursing officer question any such payment. I also understand that the contractor protested the use of the 37 foot 6 inch base, whereupon the constructing quartermaster decided the dispute by overruling the contractor's protest and thereafter the contractor took no appeal either to the contracting officer or to the head of the Department. Our practice would be that where the constructing quartermaster as representative of the contracting officer decides such a dispute pursuant to Article 15 of the contract, the disbursing officer has no power to challenge such a ruling.

Another reason why the Finance Officer would not undertake to determine the question presented in this case is that finance officers as a rule have no experience with construction and would not be qualified to make such decisions.

(Signed) A. C. HARDEN,
Colonel, FD.

Sworn to before me this 27th day of June 1945.

J. LINDEN WILL,
Notary Public, Arlington County, Virginia.
My commission expires December 11, 1946.

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